

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1441

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

B
R/S

UNITED STATES OF AMERICA,

vs.

JOHN MICHAEL TAKACH,

Defendant-Appellant.

APPENDIX FOR APPELLANT

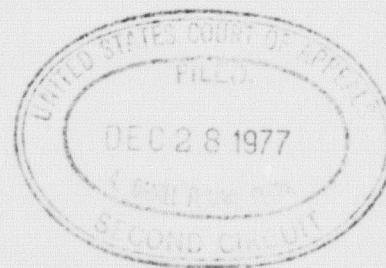
JOEL WINOGRAD

Attorney for Appellant

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New York, New York 10022

(212) 688-1726



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APPENDICES

Docket Sheet

A-1

Complaint

A-2

Prior similar act
Testimony

A-4

pc

* Show last names and suffixes not 10% of other defendants on same indictment and/or charge.

DATE	DOCUMENT NO.	PROCEEDINGS
5-3-77		Complaint filed, warrant issued.
5-11-77		Warrant returned, defendant presented. Counsel JOEL WINOGRAD of 950 3rd Ave, n.y. n.y. 10022 present. Preliminary Exam. waived. Defendant released on 1,000 unsecured P.R.B /P.S.A supervision.
7-1-77		INDICTMENT FILED, 77 CR 503Owen,J.
7-7-77		Deft. not present (no atty. present). B/W Ordered. Court directs a not guilty plea be entered. Case assigned to Conner,J. for all purposes.....Ward,J. B/W Issued.
7-8-77		DEFT (Atty.present) Bench Warrant Vacated Bail \$1000. Continued. WARD, J.
8-4-77		Filed Govts.affdvt. & order to show cause for order directing the deft to furnish handwriting exemplars to the Govt. ret.8-3-77 at 2 P.M....Goettel, J.....
8-12-77		Filed affdvt. of Jane W.Parver,AUSA in further support of Govts application compelling deft to furnish handwriting exemplars.....

5.5.3

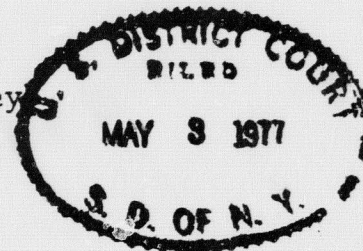
in 02-7-

— OVER —

A-1

Approved: Richard F. Ziegler

RICHARD F. ZIEGLER
Assistant United States Attorney



Before: HON. KENT SINCLAIR
United States Magistrate
Southern District of New York

-----X
UNITED STATES OF AMERICA

-v-

JOHN MICHAEL TAKACH,

Defendant.

77-581
COMPLAINT

Violation of
18 U.S.C. §1341

-----X
SOUTHERN DISTRICT OF NEW YORK, SS.:

RICHARD J. BOWDREN, being duly sworn, deposes and says that he is a Postal Inspector of the United States Postal Service, and charges as follows:

On or about and between the 21st day of March, 1977, and continuously thereafter, up to and including the date of the filing of this complaint, within the Southern District of New York, the defendant JOHN MICHAEL TAKACH did knowingly and wilfully devise and employ a scheme and artifice to defraud and to obtain property and money by means of false and fraudulent pretenses, representations and promises.

It was part of said scheme and artifice to defraud that the defendant JOHN MICHAEL TAKACH answered an advertisement placed in a "model railroad enthusiasts" magazine by offering to sell to the advertiser, Robert Wandell, Jr., various model railroad equipment being sought by the advertiser.

It was further a part of said scheme and artifice that the defendant JOHN MICHAEL TAKACH would write, and place in the United States Mails, within the Southern District of New York, a specific offer to Mr. Wandell using a false and fictitious letterhead, to wit, stationery purporting to belong to the Internal Affairs Division of the New York Police Department, thereby lulling the recipient of said letter into believing that he was dealing with a police official, when in fact the defendant was not such an official but rather a recent releasee from a two-year sentence imposed by the United States District Court for the Eastern District of New York for mail fraud.

The bases for the foregoing charge, in part, are as follows:

- A-2
1) Information obtained in the course of official

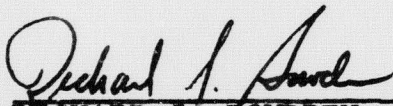
a) Your deponent was advised by Robert W. Wandell, Jr. that the defendant JOHN MICHAEL TAKACH responded by letter dated March 21, 1977 to an advertisement placed by Mr. Wandell in "Model Railroader" magazine, soliciting model railroad equipment, and that JOHN MICHAEL TAKACH offered to sell such equipment for \$40.00, payable in advance. The letter of JOHN MICHAEL TAKACH was on a fictitious letterhead purporting to belong to the New York City Police Department, Internal Affairs Division, and requested payment by United States Postal Service money order.

b) Mr. Wandell further advised your deponent that he sent such a money order to John MICHAEL TAKACH to the address provided in the letter of March 21, 1977, to wit, 166 West 21st Street, New York, New York. JOHN MICHAEL TAKACH responded by letter dated April 18, 1977 to Mr. Wandell that he had been unable to cash the money order, and requested another.

2. Mr. Wandell addressed his response to the letter of April 18, 1977 to JOHN MICHAEL TAKACH at the Internal Affairs Division, N.Y.P.D. The New York Police Department thereupon advised your deponent of the receipt of such letter from Mr. Wandell.

3. JOHN MICHAEL TAKACH was convicted in the United States District Court for the Eastern District of New York on November 10, 1975 for violations of 18 U.S.C. §1341 by means similar to the transaction described above, in which he responded to advertisements seeking model railroad equipment, demanded payment in advance, and failed to furnish the promised merchandise after receiving payment. In addition, JOHN MICHAEL TAKACH has been arrested three previous times, spanning 12 years, for similar schemes.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above-named defendant and that he may be arrested and imprisoned, or bailed as the case may be.


RICHARD J. BOWDREN

Sworn to before me this
3rd day of May, 1977



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2 all three and we can get through all three before five,
3 we can take all three.

4 MS. PARVER: I think we definitely could, your
5 Honor.

6 THE COURT: All right.

7 (In open court)

8 MS. PARVER: The Government calls John Benson.

9 THE COURT: I instruct the jury that the next
10 three witnesses are going to testify regarding prior acts
11 by the defendant. Now, those acts are not the subject of
12 this present criminal prosecution. They are being
13 introduced only for whatever probative value they might
14 have in establishing the intent of the defendant with
15 respect to the particular acts that are involved in this
16 suit.

17 As I will instruct you in my final charge in
18 greater detail, one of the things that the Government must
19 prove beyond a reasonable doubt with respect to each of the
20 four transactions which are the subject of the present
21 indictment is that the defendant intended to defraud the
22 four persons to whom he wrote letters and from whom he
23 solicited checks or money orders; that is, that he intended
24 to receive money from them without furnishing them the
25 promised consideration, whether it was railroad equipment

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2 or dictionaries or whatever.

3 The proof of a person's state of mind or his
4 intention is very difficult. We can never look into a
5 person's mind to see what he actually intended or what he
6 was actually thinking.

7 So, the law permits the Government to introduce
8 evidence of other acts by the same defendant for whatever
9 value those other acts might have to the jury in
10 determining what the defendant's intent or state of mind
11 was with respect to the particular acts that are here
12 directly involved.

13 Now, these other acts are being relied upon not
14 to prove anything with respect to the character or
15 personality of the defendant other than his intent with
16 respect to the particular acts herein involved.

17 The present case does not involve these other
18 acts. They are not within the framework of this criminal
19 prosecution and those other acts are being relied upon only
20 to prove the intent of the defendant with respect to the
21 acts that are involved here. They should not be
22 considered for any other purpose.

23 All right.

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JOHN CHARLES BENSON, called as
a witness by the Government, being first duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MS. PARVER:

Q Where do you live?

A 4361 Clarkwood Parkway, Apartment 108,
Warrensville Heights, Ohio.

Q How are you employed?

A I am a school teacher.

Q Do you have any hobbies?

A Yes, I do.

Q What are those?

A Railroad antiques, collecting railroad
antiques and photography.

Q Directing your attention to sometime in early
1974, did you place an advertisement in a railroad
magazine in connection with your hobby?

A Yes, I did.

Q You don't have a copy of that magazine, do you?

A No, I do not.

Q Can you tell us what you recall, if anything,
of your advertisement?

A I was selling railroad antiques, such as

A -6

builder's plates and passes and timetables.

Q Did there come a time when you received a letter offering to sell you items?

A Yes.

Q Can you recall who that letter was from?

A Yes. A J. M. Takach.

Q You did not retain the original or a copy of that letter, did you?

A No.

MR. WINOGRAD: I object to the leading nature of the questions.

THE COURT: Insofar as the previous question and answer are concerned, I will allow them to stand, but watch the form of the questions.

MS. PAPVER: Certainly, your Honor.

Q Could you tell us what was said, if you can recall, in that letter to you?

A Yes, I was offered for \$75 three locomotive builder's plates.

Q Could you just briefly explain to us what locomotive builder's plates are?

A Yes. Every railroad locomotive built has a construction plack and that is what they are, and the three that were offered was American Locomotive Company, a Lionel

A-7

Locomotive Company and a Baltimore Locomotive Company plate.

Q In connection with your experience with this hobby, what kind of price was \$75 for these plates?

A That was a good price.

Q What, if anything, did you do in response to this letter?

A The day I received it, I tried calling Mr. Takach and the phone company said there was no listing so I immediately secured a money order as directed in the letter and sent it by U. S. Mail.

Q What, if anything, happened then?

A Approximately three weeks went by before -- or I had not received a reply and so I wrote again requesting the builder's plates.

Q Did you get any response?

A Yes, I did.

Q I show you Government's Exhibit 31 for identification and ask you if you can identify that?

A Yes. This was the letter I received.

Q This is a copy of the letter that you received?

A Yes, this is a copy.

Q Did you retain the original? Do you still have the original?

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A No, I do not.

Q How did you receive this letter?

A U. S. Mail.

MS. PARVER: The Government offers Exhibit 31.

MR. WINOGRAD: I stand on my continuing
objection to this entire line.

THE COURT: All right. The exhibit will be
admitted.

MS. PARVER: Thank you, your Honor.

(Government's Exhibit 31 for identification
received in evidence.)

MS. PARVER: May I read it, your Honor?

THE COURT: You may.

MS. PARVER: Thank you.

(Ms. Parver read Government's Exhibit 31
in evidence to the jury.)

Q After receiving Government's Exhibit 31, what,
if anything, did you do?

A I immediately contacted the bank and received
a copy of the money order. It was signed by a J. M.
Takach. I then wrote to Mr. Takach again informing him
that I did check and received a copy of the money order and
that I expected receipt of the plates.

Q What, if anything, happened then?

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2 A I received one more letter from him and it stated
3 that he would cooperate fully in this matter and that was it.

4 Q Mr. Benson, I show you Government's Exhibit 32
5 for identification and ask you if you can identify that?

6 A Yes, this is the letter.

7 Q That you received from Mr. Takach?

8 A Yes.

9 Q Is this a copy of the envelope in which you
10 received it?

11 A Yes, it is.

12 MS. PARVER: The Government offers Exhibit 32
13 for identification.

14 MR. WINOGRAD: Same objection.

15 THE COURT: All right. Admitted.

16 (Government's Exhibit 32 for identification
17 received in evidence.)

18 Q Mr. Benson, I show you Government's Exhibit 33
19 for identification and ask you if you can identify that?

20 A Yes. This is a copy of the money order that I
21 sent.

22 Q The second page of Government's Exhibit 33 for
23 identification is the back of that money order?

24 A Yes.

25 Q This was provided to you by your bank?

A-10

2 A Yes, it was.

3 MS. PARVER: The Government offers Exhibit 33
4 for identification.

5 MR. WINOGRAD: Same objection, your Honor.

6 THE COURT: Same ruling.

7 (Government's Exhibit 33 for identification
8 received in evidence.)

9 BY MS. PARVER:

10 Q Mr. Benson, did you ever hear any further
11 from Mr. Takach?

12 A No.

13 Q Did you ever receive your locomotive plates
14 from Mr. Takach?

15 A No.

16 Q Did you ever get your \$75 back from Mr. Takach?

17 A No.

18 MS. PARVER: I have no further questions.

19 MR. WINOGRAD: No questions.

20 THE COURT: Thank you, sir.

21 (Witness excused)

22 MS. PARVER: The Government calls John
23 Buursema.

J O H N B U U R S E M A , called as a witness
by the Government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MS. PARVER:

Q Mr. Buursema, where do you live?

A In West St. Paul, Minnesota.

Q Could you just try to keep your voice up a
tiny bit so we can all hear you!

Are you married?

A Yes.

Q Do you have any children?

A Four.

Q How are you employed?

A I am the president of a shipyard in St. Paul.

Q Do you have any hobbies?

A Yes. I have model railroading as a hobby.

Q Sir, directing your attention to March or
April of 1974, did you place an ad in the June 1974 issue
of the Model Railroad Magazine?

A Yes, I did.

Q I show you Government's Exhibit 66 for
identification and ask you if you can identify that. What
is this?

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2 A That is the Model Railroad Magazine.

3 Q Of June 1977?

4 A Yes.

5 Q Does it contain your advertisement, if you
6 can find it?

7 A Yes.

8 THE COURT: What did you say the date was?

9 THE WITNESS: 1974, not 1977.

10 THE COURT: I think you referred to 1977.

11 THE WITNESS: 1974.

12 Q This contains your advertisement, is that
13 accurate?

14 A That's correct.

15 MS. PARVER: The Government offers Government's
16 Exhibit 66.

17 MR. WINOGRAD: Same objection, your Honor.

18 THE COURT: It will be admitted.

19 (Government's Exhibit 66 for identification
20 received in evidence.)

21 Q Do you recall what it was that you were
22 advertising for?

23 A For narrow gauge locomotive models and
24 rolling stock.

25 Q Did there come a time when you received a

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2 response to your advertisement?

3 A Yes.

4 Q Do you recall who that response was from?

5 A Yes.

6 Q Who was that?

7 A Mr. Takach.

8 Q I show you Government's Exhibit 20 for
9 identification and ask you if you can identify that.

10 A Yes. That was the letter sent to me in answer
11 to my ad.

12 Q Is that a copy of the envelope that it was
13 sent in?

14 A That's right.

15 Q Did you retain the original? Do you still have
16 the original of this letter?

17 A No, I have discarded those.

18 MS. PARVER: The Government offers Exhibit 20.

19 MR. WINOGRAD: Same objection, your Honor.

20 THE COURT: The exhibit will be admitted.

21 (Government's Exhibit 20 for identification
22 received in evidence.)

23 MS. PARVER: May I read this, your Honor?

24 THE COURT: You may.

25 (Ms. Parver read Government's Exhibit 20 in

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evidence to the jury.)

BY MS. PARVER:

Q Mr. Buursema, based on your experience in your hobby, what kind of price was that \$75?

A That was a reasonable price.

Q After you received that letter, what, if anything, did you do?

A I got a postal money order for \$76.50 and sent it to Mr. Takach for one of the two locomotives.

Q Did you then receive your model locomotive?

A No, I did not.

Q What, if anything, did you do then?

A I sent him a letter explaining that I did not receive the merchandise and I asked him to please send it to me.

Q Did you get a response?

A Yes. I got a letter from him explaining why it had not arrived yet or why not.

Q Let me show you Government's Exhibit 21 for identification and ask you if you can identify that.

A Yes. That is the response to my letter.

Q Try to keep your voice up a little because I am not quite sure that everyone is understanding you.

Government's Exhibit 21 also contains a copy --

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is that the copy of the envelope that you received it in?

A That's correct.

Q Do you have the originals of these today?

A No, I discarded those.

MS. PARVER: The Government offers Exhibit 21.

MR. WINOGRAD: My continued objection, your Honor.

THE COURT: It will be admitted.

(Government's Exhibit 21 for identification received in evidence.)

MS. PARVER: May I read this, your Honor?

THE COURT: You may.

(Ms. Parver read Government's Exhibit 21 in evidence to the jury.)

BY MS. PARVER:

Q Did you receive your locomotive after that?

A No.

Q Did you do anything else?

A Yes. I sent him another letter threatening to go to the postal inspection authorities if I did not get either the merchandise or the refund of my money.

Q Did you ever receive a response from Mr. Takach?

A No.

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2 Q Did you ever receive your locomotive?

3 A No.

4 Q Did you ever get your money back from Mr.
5 Takach?

6 A No.

7 MS. PARVER: I have no further questions of
8 this witness.

9 MR. WINOGRAD: No questions.

10 THE COURT: Thank you.

11 (Witness excused)

12 THE COURT: I understand you have one more
13 witness along this line?

14 MS. PARVER: Yes, your Honor.

15 THE COURT: Is that an out of town witness
16 also?

17 MS. PARVER: Yes, he has just come in today.

18 THE COURT: I will ask the jury to bear with
19 us. We are going a little beyond our regular time, but we
20 have another short witness from out of town.

21 MS. PARVER: I think he has to because I think
22 he has missed his plane so it is up to your Honor.

23 THE COURT: If he has got to stay overnight
24 anyway, then we will recess until ten o'clock in the
25 morning.

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2 Try to be prompt so we are not delayed in
3 getting started and don't discuss the case in the meantime
4 with your fellow jurors or anyone else.

5 Have a good evening.

6 Just leave the exhibits on the front rail of
7 the jury box.

8 (Jury left the courtroom)

9 THE COURT: You may want to keep those
10 separate and recirculate them tomorrow because all the
11 jurors have seen them.

12 MS. PARVER: Thank you, your Honor.

13 THE COURT: Mr. Winograd, are you going to file
14 any proposed charges?

15 MR. WINOGRAD: No, your Honor.

16 THE COURT: All right. See you in the morning
17 then.

18 (Court adjourned)

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2 UNITED STATES OF AMERICA

3 vs.

77 Cr. 503

4 JOHN MICHAEL TAKACH

5
6 August 23, 1977
7 10:25 a.m.

8 (Trial resumed; jury present)

9 MS. PARVER: The Government calls Albert
10 Wesling.

11 A L B E R T R. W E S L I N G, called as a
12 witness by the Government, being first duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MS. PARVER:

16 Q Mr. Wesling, you are from Indianapolis,
17 Indiana?

18 A That's correct.

19 Q How are you employed, now?

20 A I am the plant engineer at the Chevrolet
21 Stamping Plant in Indianapolis, Indiana.

22 Q Are you married?

23 A Yes, I am.

24 Q Do you have any hobbies?

25 A Yes. I collect old electric trains.

2 Q How long have you been collecting old
3 electric trains?

4 A Twenty-five years or so.

5 Q Now, Mr. Wesling, directing your attention to
6 1974, did you place an advertisement in a railroad
7 magazine in connection with your hobby?

8 A Yes, I did.

9 Q Let me show you what has been marked as
10 Government's Exhibit 64 for identification and ask you if
11 you can identify that.

12 A Yes, I can.

13 Q What is that, sir?

14 A That is my magazine, the Railroad Model
15 Craftsman, April 1974.

16 Q And does that contain your advertisement in it?

17 A Yes, it does.

18 Q That is at page 68?

19 A That's correct.

20 MS. PARVER: The Government offers Exhibit 65.

21 MR. WINOGRAD: Same objection, your Honor.

22 THE COURT: It will be received.

23 (Government's Exhibit 65 for identification
24 received in evidence.)

25 MS. PARVER: May I read the advertisement, your

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Honor?

THE COURT: Yes, you may.

(Ms. Parver read to the jury from Government's Exhibit 65 in evidence.)

BY MS. PARVER:

Q Would you tell the ladies and gentlemen of the jury, Mr. Wesling, what is a Lionel Hiawatha?

A It is a very famous train that operated out of St. Paul and this was a Lionel copy that came out in 1935 and it is a real collector's item.

Q Did there come a time when you received a response to your advertisement?

A Yes, I did. I received the response from Mr. Takach.

Q How did you receive that response?

A I got a letter from him and he offered a 226E, with a whistle tender for \$60.

Q Did you receive that letter in the mail?

A Yes, I did.

Q Now, I show you Government's Exhibit 22 for identification and ask you if you can identify that.

A Yes, I can.

Q What is that, sir?

A That is the letter I received from Mr. Takach.

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2 Q And are these --

3 A That is a note I put on it.

4 Q Those are your notes in the lower left-hand
5 corner?

6 A Yes.

7 Q And part of Government's Exhibit 22 is a copy
8 of the envelope in which you received that letter, is that
9 correct?

10 A That's correct.

11 Q And do you have the original of this letter?

12 A No, I do not.

13 MS. PARVER: The Government offers 22.

14 MR. WINOGRAD: Same objection.

15 THE COURT: It is received.

16 (Government's Exhibit 22 for identification
17 received in evidence.)

18 Q Mr. Wesling, you say that you were offered \$60?

19 A Yes, that's correct.

20 Q Mr. Takach said he would sell it to you for
21 \$60.

22 What, if anything, did you do after receiving
23 that?

24 A I wrote Mr. Takach a letter and offered him
25 \$40 plus \$2 for postage.

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Q What happened then?

A I received a letter from Mr. Takach accepting the \$42.

Q I show you Government's Exhibit 23 for identification and ask you if you can identify that.

A That's correct. Yes, I can.

Q What is it, sir?

A That is the letter offering a 226E with a whistle tender for the \$40, yes.

Q Did you receive this in the mail as well?

A Yes, I did.

Q Just to avoid repetition, Mr. Wesling, do you have any originals of any of these letters?

A No, I do not.

MS. PARVER: The Government offers Exhibit 23.

MR. WINOGRAD: Same objection.

THE COURT: It will be accepted.

(Government's Exhibit 23 for identification received in evidence.)

MS. PARVER: May I read this to the jury, your Honor?

THE COURT: Yes.

(Ms. Parver read to the jury from Government's Exhibit 23 in evidence.)

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Q Let me show you Government's Exhibit 24 for

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identification and see if you can identify that.

A Okay. Yes, I can. He received the check for \$42.

Q Mr. Wesling, you can identify it?

A Yes.

Q Is this the letter that you received from Mr. Takach?

A Yes, it is.

Q And is this a copy of the envelope in which you received the letter?

A Yes, it is.

MS. PARVER: The Government offers Government's Exhibit 24 for identification.

MR. WINOGRAD: Same objection.

THE COURT: Overruled.

(Government's Exhibit 24 for identification received in evidence.)

MS. PARVER: May I read this to the jury?

THE COURT: Yes.

(Ms. Parver read to the jury from Government's Exhibit 24 in evidence.)

BY MS. PARVER:

Q Now, did you then send a check for \$75?

A That's correct; plus \$1 for additional

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postage, a total of \$76.

Q Did you then receive your locomotives?

A No, I did not.

Q What, if anything, did you do?

A Well, I wrote him again about two weeks later, I believe, and I told him I was getting a little concerned; could he send me the postal insurance number.

Q And did you get a response?

A Yes, I did. Mr. Takach sent me the number.

Q I show you Government's Exhibit 26 for identification and ask you if you can identify that.

A Yes, I can.

Q And what is it?

A That is the letter with the reply that he received the both checks, plus the number, the insurance certificate.

Q Is the second page of Government's Exhibit 26 for identification a copy of the envelope in which you received that?

A Yes, it is.

MS. PARVER: The Government offers 26 for identification.

MR. WINOGRAD: Same objection, your Honor.

THE COURT: Objection overruled.

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(Government's Exhibit 26 for identification
received in evidence.)

MS. PARVER: May I read parts of this?

THE COURT: Yes.

(Ms. Parver read from Government's Exhibit 26
in evidence to the jury.)

BY MS. PARVER:

Q Now, did you receive your locomotives after
that?

A No, I did not.

Q And what, if anything, happened then?

A Well, I wrote again to Mr. Takach and told
him that we should be processing a claim, as I believe, to
see what happened to the package.

I was checking the post office each day and
nothing arrived.

Q Did you get any response from Mr. Takach?

A Yes, I did. I got another response and this
time there was another number, I believe, in this letter,
with another number for the postal insurance certificate.

Q Mr. Wesling, I show you Government's Exhibit 27
for identification and ask you if you can identify that.

A Yes, I can.

Q And what is that?

A27

2 A That is the letter with the other postal
3 number on it; the insurance inspection ticket.

4 Q And does Government's Exhibit 27 for
5 identification also contain a copy of the envelope in
6 which you received that letter?

7 A Yes.

8 MS. PARVER: The Government offers 27.

9 MR. WINOGRAD: Same objection.

10 THE COURT: Overruled.

11 (Government's Exhibit 27 for identification
12 received in evidence.)

13 MS. PARVER: May I read this, your Honor?

14 THE COURT: Yes.

15 (Ms. Parver read to the jury from Government's
16 Exhibit 27 in evidence.)

17 BY MS. PARVER:

18 Q Did you then receive your locomotives?

19 A No, I did not.

20 Q What, if anything, did you do?

21 A When I saw the two different numbers, I wrote
22 a letter to Mr. Takach and asked him for a photostat of
23 the actual postal receipt.

24 Q And did you get a response?

25 A That was the last I ever heard from Mr. Takach.

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Q Did you do anything else?

A Yes. I called the Indianapolis Claims Division and explained the case to them and he said --

MR. WINOGRAD: Objection.

THE COURT: Well, he can tell us what he did. Don't tell us what the other man said.

A Well, I called the postal inspector there, or the Claims Division.

THE COURT: And you explained the case to them?

THE WITNESS: Yes, I did.

THE COURT: Did you do anything as a result of your conversation with him?

THE WITNESS: Yes, I did. I called the Brooklyn Post Master.

BY MS. PARVER:

Q Did you speak with anyone in the Insurance Claims Department?

A I can't recall whether I talked to them on the phone or wrote them a letter. I did definitely write them. I am quite sure I wrote them a letter.

Q Did you ever receive any insurance claim form or notification that one had been filed?

A No, I did not.

Q Did you ever write to Mr. Takach again?

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141

A Yes. I followed that up with either three or four additional letters explaining my concern for the packages, the fact that they could have been lost or whatever --

Q Did you ever get a response?

A I never got a response and none of the letters were returned.

Q Did you ever make any phone calls?

A Yes. I called a buddy here in Brookly who was in World War I -- World War II with me --

MR. WINOGRAD: Objection.

THE COURT: He can tell us what he did.

Just tell us what you did.

Q Mr. Wesling, why don't you just confine your attention, at the moment, to anything to do with Mr. Takach; any phone calls to Mr. Takach.

A Yes. I called the Brooklyn operator and I tried to locate Mr. Takach and she said there was no phone listed.

MR. WINOGRAD: Objection.

THE COURT: Are you relying on this to prove the truth of what the operator said, Ms. Parver?

MS. PARVER: Just for the fact that he was unable to --

A30

2 Q Were you able to get a number to call?

3 A I was not able to get a number to call.

4 Q Did you ever get or have you ever received a
5 response to any of your letters subsequently to Mr.
6 Takach from Mr. Takach?

7 A No, I did not.

8 Q Have you ever received to this day your money
9 back from Mr. Takach?

10 A I have not.

11 Q And have you ever received your locomotive from
12 Mr. Takach to this day?

13 A I did not.

14 MS. PARVER: I have no further questions of
15 this witness.

16 MR. WINOGRAD: No question, your Honor.

17 THE COURT: Thank you very much.

18 (Witness excused)

19 MS. PARVER: At this time, your Honor, the
20 Government offers Government's Exhibit 70 into evidence,
21 which is a stipulation between the Government and the
22 defendant.

23 THE COURT: All right.

24 MR. WINOGRAD: It's been entered and we have no
25 objection to it.

A3/

THE COURT: All right. Do you wish to read it to the jury?

MS. PARVER: Yes, thank you, your Honor.

This is a stipulation and it says:

"It is hereby stipulated and agreed by and between the United States of America, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Jane W. Parver, Assistant United States Attorney, of counsel, and the defendant, John Michael Takach and his attorney, Joel Winograd, Esq., that:

"1. Government's 1-A and 1-B in evidence were prepared and signed by the defendant, John Michael Takach.

"2. Government's Exhibits 6, 8, 10, 12, 13, 14, 15, 20, 21, 22, 23, 24, 26, 27, 31 and 32 in evidence are letters written and signed by the defendant, John Michael Takach.

"3. Government's Exhibit 7, 9, 11 and 33 in evidence are checks and money orders endorsed by the defendant, John Michael Takach.

"4. Government's Exhibit 40 in evidence was prepared and signed by the defendant, John Michael Takach."

It is dated New York, New York, August 23, 1977, and signed by Jane W. Parver, John Michael Takach and Joel Winograd.

A32

2 THE COURT: In order to clarify the record,
3 does that stipulation cover all of the letters in evidence
4 and all of the checks in evidence that purportedly were
5 signed by Mr. Takach?

6 MS. PARVER: Yes, it does, your Honor.

7 THE COURT: I might explain to the jury that a
8 stipulation is merely an agreement between the attorney
9 for the Government and the attorney for the defendant as to
10 a certain set of facts.

11 The stipulation is binding on both parties and
12 dispenses with the necessity of any evidence to prove
13 those facts. In other words, the jury may and must accept
14 those facts as true.

15 MS. PARVER: Your Honor, may we approach the
16 bench.

17 (At the side bar)

18 MS. PARVER: Your Honor, the only remaining
19 item before the Government rests is the introduction of
20 the conviction and, the Government would also contend, the
21 underlying facts pertinent to the conviction.

22 THE COURT: I thought you were going to
23 stipulate the fact of conviction, instead of putting in the
24 actual judgment.

25 MS. PARVER: Yes, but there is the question of

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2 the underlying facts, because that is the only way that
3 the jury can understand the conviction, and what the
4 Government is prepared to do since it was a plea to a
5 specific count is read or introduce, however your Honor
6 wishes, the certified copy of the indictment as it
7 pertained to that one count and then the fact of conviction.

8 THE COURT: As I understand it, Mr. Winograd,
9 your objection to the reading of that count of the
10 indictment is that it tracks the statutory language.

11 MR. WINOGRAD: That was my objection yesterday
12 and still is today.

13 In other words, this morning, Ms. Parver and I
14 were discussing the words and form of the stipulation with
15 respect to that factual situation and that is what I
16 thought we were going to do with respect to the conviction
17 in the Eastern District.

18 MS. PARVER: The conviction itself is not
19 enough for the jury.

20 THE COURT: I agree. I don't see any
21 alternative to reading the count to which he pleaded guilty.

22 MS. PARVER: And when I read it, your Honor,
23 I will just use the one name.

24 THE COURT: Yes, I understand; for the one
25 count.

A34

MS. PARVER: Yes, your Honor.

MR. WINOGRAD: This is being done by stipulation, your Honor? In other words, I have agreed that there would be a stipulation as to the fact that he was convicted in the Eastern District on a day certain in the year 1974.

I don't agree that she has the right to read the actual wording of the indictment with which he was charged and to which he pled guilty. You are now saying that she has the right to read that?

THE COURT: Yes, that's correct.

MR. WINOGRAD: I have an objection to that.

THE COURT: If you can propose any viable alternative which will get before the jury the nature of the charge to which he was pleading guilty, I would consider that alternative but I can't think of any way in which the guilty plea could have any meaning.

MR. WINOGRAD: Could we just say the title and the section of the code to which he pled guilty on that day in 1974?

THE COURT: Well, I think the facts constituting the charge would have to be brought to the attention of the jury. In other words, the facts would show the similarity of the offense there charged to the

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2 similarity of the offense here charged in order to make it
3 relevant.

4 MR. WINOGRAD: All right. If that is your
5 position.

6 One other thing while we are here, Judge. I
7 noticed during the course of the trial Juror No. 5 has
8 been writing and I just wondered whether he was taking
9 notes for himself with respect to something other than the
10 trial. I just saw him doing it this morning.

11 THE COURT: I will caution him not to discuss
12 the notes with anybody else and not to take any notes.

13 MR. WINOGRAD: What about the notes he has
14 already taken?

15 THE COURT: If he was, I will instruct him to
16 destroy them.

17 (In open court)

18 THE COURT: Juror No. 5, I noticed that you
19 have been writing. I don't know whether you are making
20 notes in connection with this trial. It is not permitted
21 to take notes of the testimony.

22 JUROR NO. 5: No, sir.

23 THE COURT: And if you have taken any notes,
24 they should be destroyed and should not be discussed with
25 or shown to anybody else.

A36

Of course, if you are writing in connection with any other matter, that is perfectly acceptable.

JUROR NO. 5: Yes, sir.

THE COURT: I believe now you want to offer in evidence the indictment and the stipulation of fact as to the guilty plea.

MS. PARVER: Yes, your Honor. If I may, we will do it by reading it out loud to the jury.

THE COURT. All right.

First, it should be in evidence. I don't think it is yet, is it?

MS. PARVER: No, it is not.

At this time, your Honor, the Government offers Exhibits 71 for identification which is the certified copy of the indictment --

THE COURT: Well, that should be redacted to eliminate everything except the one count to which he pleaded guilty.

MS. PARVER: It will be, your Honor, before it is shown to the jury at any time.

The Government also offers Government's Exhibit 72 for identification into evidence which is the certified copy of the conviction.

THE COURT: Of the what?

A 37

MS. PARVER: Judgement of conviction.

THE COURT: I thought that was going to be done by simply stipulating that he pleaded guilty to the one count which you are reading.

MS. PARVER: Fine, your Honor.

"Then it is stipulated between the Government and the defendant by his counsel that on November 7, 1975, the defendant, John Michael Takach, was convicted of the following charge" --

THE COURT: Well, he pleaded guilty to it.

MS. PARVER: He pleaded guilty to it in June of 1975.

THE COURT: Yes.

MS. PARVER: "On or about and between the 31st day of December 1973 and the 1st day of October 1974, both dates being approximate and inclusive, as hereinafter set forth, within the Eastern District of New York, the defendant, John Michael Takach, knowingly and willfully devised a scheme and artifice to defraud and to obtain money from the following person by means of false and fraudulent pretences, representations and promises, Joseph Toff, Jr." --

MR. WINOGRAD: Your Honor, may we have a side bar?

A38

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2 THE COURT: All right.

3 (At the side bar)

4 MS. PARVER: That is Count 1. I am not going
5 to read the names. It is just the one person. I am just
6 going to read that which pertains to Mr. Takach. That is
7 the count to which he pleaded guilty.

8 MR. WINOGRAD: You don't have to read the
9 whole indictment.

10 MS. PARVER: It exposes the facts to which he
11 pled. How else is the jury going to understand it?

12 MR. WINOGRAD: I thought that was the
13 stipulation.

14 THE COURT: This is the original indictment?

15 MR. WINOGRAD: That is the original indictment.
16 In other words, in front of all of these people --

17 THE COURT: She is going to read only the one
18 name.

19 MR. WINOGRAD: But you are going to go through
20 each of the paragraphs?

21 MS. PARVER: You have to. That is what he
22 pleaded guilty to. That is the fact which makes it
23 relevant to the jury today and constitutes a similar act.

24 MR. WINOGRAD: Just the one name.

25 MS. PARVER: Yes.

(In the presence of the jury)

THE COURT: Because of the interruption, I think it is appropriate to make it clear to the jury that what Ms. Parver is doing is to read Count 1 of an indictment which was filed in the United States District Court for the Eastern District of New York, in Brooklyn, to which the defendant pleaded guilty in 1975.

The reason this is being permitted is as evidence of the intent of the defendant in connection with the offenses charged here.

This was an entirely different incident that was involved in Brooklyn. It is the defendant's position, as Mr. Winograd will explain to you more fully, that the defendant did not use the mails to defraud, that he actually intended to furnish to the people with whom he corresponded the equipment that he was offering for sale.

The Government has the burden of proving beyond a reasonable doubt that the defendant did not intend to furnish that equipment and, as one element of evidence in which or on which the Government relies in attempting to prove the defendant's lack of intent to furnish the equipment he was purporting to sell, it relies upon his plea of guilty to a charge of using the mails to defraud in the U. S. District Court in the Eastern District of New York.

A40

The only relevance of that to this case is as it bears on the question of the defendant's intent and his participation in a scheme or plan to defraud.

All right.

MS. PARVER: Thank you, your Honor.

"2. It was a part of said scheme and artifice that the defendant, John Michael Takach, responded through the mails to an advertisement placed by Joseph Toff, Jr., in a railroad and model railroad magazine in which in the advertisement Joseph Toff, Jr., had indicated that he desired to acquire a specified article or specified articles of model railroad equipment.

"3. It was further a part of said scheme and artifice that the defendant, John Michael Takach, in responding to the aforesaid advertisement represented that he could provide all or some of the articles of model railroad equipment which were being sought, whereas, in truth and fact, as the defendant, John Michael Takach then knew, he, the defendant, John Michael Takach, had no intention of providing any of such articles of model railroad equipment.

"4. It was further a part of said scheme and artifice that the defendant, John Michael Takach, solicited payment in advance from Joseph Toff, Jr., for the articles

A41

1 of model railroad equipment which he sought and
2 successfully induced Joseph Toff, Jr., to order certain
3 models of railroad equipment and to make payment in
4 advance when ordered.
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6 "It was further a part of said scheme and
7 artifice that the defendant, John Michael Takach,
8 knowingly and willfully cashed check and money order
9 remitted to him by Joseph Toff, Jr., and converted the
10 proceeds thereof to his own use and the defendant, John
11 Michael Takach, knowingly and willfully failed to deliver
12 or cause to be delivered to Joseph Toff, Jr., any of the
13 articles of model railroad equipment which he had ordered
14 from him.

15 "6. It was further a part of said scheme and
16 artifice that the defendant, John Michael Takach, sent
17 letters to Joseph Toff, Jr., causing him to expect receipt
18 at a future date of the particular article of model
19 railroad equipment which he had ordered from the defendant,
20 John Michael Takach.

21 "7. On or about the date hereinafter set forth
22 within the Eastern District of New York and for the
23 purpose of executing said scheme and artifice, the
24 defendant, John Michael Takach, knowingly placed and caused
25 to be placed in post offices and authorized depositories

A42

for mail matter various letters and mail matter to be sent and delivered by the postal service as hereinafter set forth."

The date is January 23, 1974 and the addressee Joseph Toff, Jr., 613 Cooper Avenue, Ennis, Texas 75119.

Your Honor, at this time the Government rests.

THE COURT: Mr. Winograd, does the defense have any motions to make?

MR. WINOGRAD: Yes, your Honor.

THE COURT: We will take our morning break now for ten minutes.

(The jury left the courtroom.)

THE COURT: All right, Mr. Winograd, I'll hear you.

MR. WINOGRAD: Your Honor, with respect to the indictment now pending before the Court, at the close of the Government's direct case, I move for a judgment of acquittal with respect to each of the counts in the indictment but, more specifically, I would like to relate to the count I believe dealing with Mr. Robert Wandel, Jr., which is Count 2 in the indictment.

Your Honor, I believe you recall from the testimony that this gentleman sent a check for \$40 as a result of a letter that he received in response to an ad

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APPELLATE DI
COURT OF APPEALS
SEC 1ST CIRCUIT

UNITED STATES OF AMERICA

- against -

JOHN MICHAEL TAKACH,

Defendant-Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the 28th day of Dec. 19 77 at L 1 St Andrews Plaza
New York, New York

deponent served the annexed

Appendix

Brief

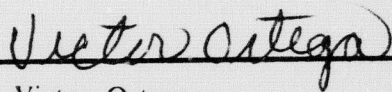
U.S. Atty-Southern District
Robert B. Fiske, Jr.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 28th
day of Dec. 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


Victor Ortega